NO. 56265-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

YOSHIO KODOMA WHITE,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Philip K. Sorensen

No. 95-1-01876-1

BRIEF OF RESPONDENT

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I. INTRODUCTION

In 1996, a jury convicted Yoshio White of first-degree murder. At sentencing, the trial court had the statutory authority to find aggravating factors and imposed an exceptional sentence based on the "deliberate cruelty" aggravating factor.

Although *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) subsequently required a jury to determine the existence of aggravating factors, it is well established that *Blakely* does not apply to convictions that were final before it was issued. White's judgment and sentence became final in 2001—prior to *Blakely*. This Court has repeatedly rejected White's challenges to his exceptional sentence based on *Blakely*.

In 2021, twenty years after White's judgment became final, the Supreme Court held that the strict liability drug possession statute is unconstitutional and violates due process. *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Based on *Blake*, the trial court vacated White's prior conviction for

unlawful possession of a controlled substance and corrected his offender score and standard range sentence.

At the *Blake* resentencing, the trial court properly exercised its discretion to reimpose the exceptional sentence based on its previous findings regarding the aggravating factor, which were affirmed on appeal and became final decades earlier. The trial court did not disturb the findings or engage in judicial factfinding. Both *Blakely* and RCW 9.94A.537—the statute enacted in response to *Blakely* setting forth the procedures for a jury to consider aggravating factors—were inapplicable at White's resentencing. Further, the law of the case doctrine bars reconsideration of the *Blakely* issue, which has already been litigated and decided by this Court. This Court should affirm the sentence.

II. RESTATEMENT OF THE ISSUES

A. Did the trial court have the authority to reimpose the exceptional sentence based on its previous findings regarding the aggravating factor where those findings were affirmed on appeal and final prior to *Blakely* and where the trial court did not disturb those findings or engage in judicial factfinding?

B. Does the law of the case doctrine bar reconsideration of the *Blakely* issue where this Court has repeatedly considered and rejected this claim on the merits?

III. STATEMENT OF THE CASE

A. Procedural History.

In 1996, a jury convicted Yoshio White of murder in the first degree. CP 111. With an offender score of 6, his standard range was 312 to 416 months. CP 112, 140. The State recommended a high-end standard range sentence based on the brutality of the crime. 1996-RP 18-19, 27;[1] *see* CP 112-13. At the 1996 sentencing, the trial court found the following three aggravating factors: (1) deliberate cruelty; (2) prior substantial criminal history showing a pattern of escalating violence; and (3) manipulation of a witness. CP 140-42; 1996-RP 27-30.

The trial court determined there were substantial and compelling reasons to impose an exceptional sentence and

[1] The State has supplemented the record with transcripts from the 1996 and 1999 sentencing hearings. The Verbatim Report of Proceedings (RP) will be referred to by the year of the sentencing: 1996-RP, 1999-RP, and 2021-RP.

entered findings of facts and conclusions of law in support of an exceptional sentence of 500 months. CP 112, 116, 140-42. The court imposed the "deliberate cruelty" aggravating factor because the victim was shot eight times and evidence indicates that "several of the shots occurred after she had been shot and was lying on the ground and defenseless[.]" CP 141. The judgment includes a notation that if White successfully appeals the exceptional sentence, the court "will" impose the high end of the range—416 months. CP 116.

On direct appeal, this Court affirmed the conviction but remanded for resentencing. *State v. White*, No. 20726-5-II, 1998 WL 109981 (Wash. Ct. App. Mar. 13, 1998) (unpublished) (*White I*). The Court agreed with the State's concession that a history of escalating violence and manipulation of a witness are not proper aggravating factors. *Id.* at *2. But the Court concluded that the facts support the deliberate cruelty aggravating factor, noting that the victim sustained seven to eight gunshot wounds all over her body and lived for several minutes as "she lay

helplessly on the ground while White completed his shooting spree." *Id.* at *2-3. The Court remanded for resentencing because it was unclear whether the trial court would have imposed the same sentence based on only one aggravating factor. *Id.* at *3. The mandate was filed on October 16, 1998. CP 120.

At the 1999 resentencing, the trial court noted it previously found the deliberate cruelty aggravating factor based on the facts—the victim was lying on the ground defenseless as she was shot six or seven more times in her head, hip, stomach, and leg. 1999-RP 4-5. The trial court concluded that this single aggravating factor is sufficient to support the 500-month exceptional sentence previously imposed. 1999-RP 4-8; *see* CP 3-9, 128-29.

On appeal, this Court concluded that the trial court did not err by imposing the same exceptional sentence because "[t]his court specifically approved the factor of deliberate cruelty." CP 128-29. This Court held that this "factor, standing alone, was sufficient to support the sentence imposed" and affirmed the

sentence. CP 129-30. The Supreme Court denied review. *State v. White*, 145 Wn.2d 1013, 40 P.3d 1176 (2001) (*White II*). The mandate was filed on December 18, 2001. CP 151-52. White's judgment and sentence became final on this date. *See* CP 137, 151, 155; *see* RCW 10.73.090(3)(b).

Over the years, White filed several personal restraint petitions and appeals challenging his sentence—they have all been dismissed. *See* CP 128-30, 135-37, 145-48, 154-56; *see also* 2021-RP 6-7, 13. Specifically, appellate courts have repeatedly denied White's claim that he is entitled to relief from his exceptional sentence under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). CP 135-37, 145-48.

In 2004, White sought relief arguing that *Blakely* prohibited the trial court from imposing an exceptional sentence unless the jury determined the deliberate cruelty aggravating factor. CP 131-35. As this Court explained, at the time of White's sentencing, the law permitted a judge to impose an exceptional sentence without the State having to submit the factors to the jury

or prove them beyond a reasonable doubt. CP 136. This Court concluded that *Blakely* does not apply retroactively to White's judgment, which became final in 2001 before *Blakely* was issued, and dismissed his petition. CP 136-37.

In 2007, this Court yet again rejected White's claim that *Blakely* applied to his exceptional sentence, noting that his judgment and sentence was final before *Blakely* was decided. CP 147-48. The Supreme Court denied review. *State v. White*, 164 Wn.2d 1029, 195 P.3d 958 (2008) (*White III*).

B. 2021 Order Correcting Judgment and Sentence Pursuant to *Blake.*

In 2021, White filed a CrR 7.8 motion to correct his offender score pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). CP 13-18. In *Blake*, the Supreme Court held that Washington's strict liability drug possession statute, RCW 69.50.4013, is unconstitutional because it criminalizes unintentional, unknowing possession of controlled substances. *Blake*, 197 Wn.2d 170. White's judgment included a prior 1989 conviction for unlawful possession of a controlled substance

(UPCS) that counted as one point in his offender score. *See* CP 4. White argued that the trial court should dismiss this conviction and resentence him under the correct offender score. CP 13-15.

The trial court scheduled a *Blake* resentencing hearing for September 21, 2021, and White submitted materials for the court's consideration. *See* CP 19-99; 2021-RP 4, 16-17. At the hearing, the parties agreed that "the court should correct the judgment and adjust the sentence originally imposed" on White. CP 101.

As a preliminary matter, White argued *Blakely* precludes the trial court from imposing an exceptional sentence without submitting the deliberate cruelty aggravating factor to the jury. 2021-RP 9, 29. White did not submit any briefing on this issue. *Id.* at 7, 16. He claimed that RCW 9.94A.537 requires the court to impanel a jury before reimposing an exceptional sentence. 2021-RP 15. The court expressed frustration that White did not provide briefing on such a "significant" issue. *Id.* at 16 (noting that White's sentencing packet includes mitigation materials but

"doesn't make any mention of any issue"—"So it's a little remarkable that we're here today on such a significant issue, basically, shooting from the hip on these issues, but continue."); *see also id.* at 21 (State noting that White failed to comply with CrR 7.8 by raising the *Blakely* issue for the first time at sentencing without filing a motion or briefing).

White objected to the court rescheduling the hearing to allow the parties to submit briefing because he had "a courtroom full of people" in support of him. *See* 2021-RP 7-9. He invited the court to exercise its discretion to impose a high-end standard range sentence of 388 months and not reach the *Blakely* issue. 2021-RP 9-11, 16-19, 29.

The State advised the court of the procedural history of the case, including that White's judgment became final prior to *Blakely* and that appellate courts have repeatedly rejected White's attempts to reverse his exceptional sentence based on *Blakely*. 2021-RP 6-7, 12-13. The State argued this is the law of the case. *Id.* at 7. The State requested the court reimpose an

exceptional sentence based on the prior finding of the deliberate cruelty aggravating factor and adjust the sentence to 472 months to account for the removal of the UPCS conviction from the judgment. *Id.* at 12-14.

The trial court vacated the prior UPCS conviction and corrected White's offender score from 6 to 5. CP 101-02. His standard sentencing range was reduced from 312-416 months to 291-388 months. CP 102; 2021-RP 30. The court expressed its belief that it had the authority to impose a sentence based on the court's previous findings regarding the aggravating factor and exceptional sentence. *See* 2021-RP 11. The court did not believe that *Blake* entitles White "to throwing out all of the findings that the trial court" previously made. 2021-RP 24. Instead, the court recognized its "authority to impose an exceptional sentence based on the findings that have been upheld multiple times by the Court of Appeals[.]" *Id.* at 29.

The court then adjusted the sentence based on its belief that defendants resentenced under *Blake* should be sentenced "to

approximately the same place in the range where they were at the time of sentencing." 2021-RP 29. The court believed the State's recommendation of 472 months "is slightly higher than where he would have been percentage-wise based on what Judge Hayes did 25 years ago." *Id.* The court adopted the deliberate cruelty aggravating factor and findings of facts and conclusions of law previously entered by the trial court and reimposed an exceptional sentence. CP 103; 2021-RP 29-30. The court imposed an exceptional sentence of 466 months based on its calculation. *Id.* The order correcting the judgment indicates that other all terms and conditions of the Judgment and Sentence dated May 4, 1999, that were not corrected or adjusted shall remain in full force and effect. CP 102-03. White filed a timely notice of appeal. *See* CP 104.

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IV. ARGUMENT

A. The Trial Court Had the Authority to Reimpose the Exceptional Sentence Based on its Previous Findings Regarding the Aggravating Factor, Which Were Affirmed on Appeal and Final Prior to *Blakely*.

The trial court correctly determined that it had the authority to reimpose an exceptional sentence based on the previous findings by the trial court regarding the deliberate cruelty aggravating factor, which had been upheld multiple times by the Court of Appeals. White's judgment was final years prior to *Blakely*, and it is well established that *Blakely* does not apply to convictions that were final before it was issued. Similarly, RCW 9.94A.537—which was enacted in response to *Blakely* and set forth the procedure for a jury to consider aggravating factors —is also inapplicable. *Blake* does not change this analysis or provide a basis to revisit this settled issue. The correction of White's offender score based on *Blake* did not require inquiry into the underlying basis for the exceptional sentence, and the trial court did not reconsider the prior findings. The trial court properly corrected White's offender score and standard range

and left the justification for the exceptional sentence intact. This was a proper exercise of the trial court's authority. This Court should affirm.

1. *Blakely* is inapplicable because White was not resentenced due to a *Blakely* error, and the trial court did not disturb the factual findings or engage in judicial factfinding.

A sentencing court's statutory authority under the Sentencing Reform Act (SRA) is a question of law reviewed de novo. *State v. Parmelee*, 172 Wn. App. 899, 909, 292 P.3d 799 (2013). It is well established that sentencing courts must sentence a defendant according to the statute in effect at the time the defendant committed the current crimes. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004); *State v. Jenks*, 197 Wn.2d 708, 715-22, 487 P.3d 482 (2021) (citing RCW 9.94A.345 and RCW 10.01.040); *Parmelee*, 172 Wn. App. at 909 (absent clear legislative intent to the contrary, sentences are determined in accordance with the law in effect when the offense was committed).

When White committed first-degree murder in 1995, the statute in effect permitted a trial court to impose an exceptional sentence if it found facts supporting an aggravating factor, including manifesting "deliberate cruelty to the victim." *See* CP 111 (judgment referencing April 13, 1995 as the date of the crime); *see* Laws of 1990, ch. 3, § 603; former RCW 9.94A.390(2)(a) (1990).[2]

The trial court correctly determined that it could rely on the court's previous finding of the deliberate cruelty aggravating factor, which was affirmed on appeal. White concedes that the trial court's ruling "would seem to be supported by *State v. Rowland*, 174 Wn.2d 150, 272 P.3d 242 (2012)." Br. of Appellant at 7. It is supported by *Rowland*. The issue in *Rowland* was whether *Blakely* applied at the defendant's resentencing where he previously received an exceptional sentence on facts found by the judge. *Rowland*, 174 Wn.2d at 152. The Supreme

[2] This statute was subsequently recodified as RCW 9.94A.535. *See* Laws of 2001, ch. 10, § 6.

Court held that *Blakely* did not apply because the trial court did not disturb the factual findings in support of the exceptional sentence. *Rowland*, 174 Wn.2d at 155-56.

In 1991, Rowland was convicted of first-degree murder. *Id.* at 152. The trial court imposed an exceptional sentence based on its finding of deliberate cruelty, which was made by the judge alone. *Id.* In 2007, Rowland challenged his offender score. *Id.* The Court of Appeals accepted the State's concession that his offender score should have been one point lower and remanded for resentencing, noting that the "error in the offender score potentially bears upon the length of the exceptional sentence, but it does not implicate the findings that justified imposition of the exceptional sentence." *Id.* at 152-53.

On remand, the resentencing court found that *Blakely* did not apply and reimposed the exceptional sentence. *Rowland*, 174

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Wn.2d at 152-53.[3] The Court of Appeals affirmed and held that the "resentencing court did not exercise independent judgment or discretion when it ordered the exceptional sentence but merely substituted the high end of one standard range for that of another and reimposed the original exceptional sentence." *Id.* at 153.

In affirming the Court of Appeals, the Supreme Court reiterated its holding that *Blakely* does not apply retroactively to convictions that were final before it was issued. *Rowland*, 174 Wn.2d at 154-56 (citing *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005)). The Court noted that the resentencing occurred post-*Blakely* but the original sentence was final pre-*Blakely*. *Rowland*, 174 Wn.2d at 154. The Court held that *Blakely* did not apply at the resentencing because the trial court did not disturb the factual findings supporting the exceptional sentence and did not increase the sentence. *Rowland*, 174 Wn.2d at 155-56.

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[3] The overall sentence was reduced because the sentencing court substituted the high-end standard range sentence for an offender score of 2 for the high-end standard range sentence for a score of 3. *Rowland*, 174 Wn.2d at 153.

As the Supreme Court explained, the trial court recognized its discretion to resentence Rowland but agreed that *Blakely* did not apply. *Rowland*, 174 Wn.2d at 154. The trial court did not reconsider the factual findings supporting the exceptional sentence and did not make any new findings regarding deliberate cruelty. *Id.* at 155. The Court of Appeals had previously rejected Rowland's challenge to the factual basis for the exceptional sentence during the initial appeal and affirmed the exceptional sentence, and "that basis has not been disturbed." *Id.* Thus, *Blakely* did not apply because the trial court did not reconsider the justification for the exceptional sentence:

> Correction of Rowland's offender score error in 2009 did not require inquiry into the underlying basis for the exceptional sentence, and no inquiry was made. The trial court on remand did not redecide the justification for the exceptional sentence, and the change to Rowland's standard range left the justification intact.

Rowland, 174 Wn.2d at 155. "*Blakely* prohibits judicial fact finding in cases final after *Blakely*, which did not occur here." *Rowland*, 174 Wn.2d at 155.

Rowland is dispositive. Like Rowland, White's judgment and sentence was final before *Blakely* was issued. His judgment became final on December 18, 2001—the date the Court issued the mandate disposing of the direct appeal following resentencing. *See* CP 151; RCW 10.73.090(3)(b); *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 948, 162 P.3d 413 (2007). This Court has repeatedly noted that White's judgment and sentence became final on December 18, 2001. CP 137, 155. *Blakely* was decided years after White's judgment became final. Thus, *Blakely* did not apply at White's resentencing.

Further, the trial court did not disturb the factual findings supporting the aggravating factor and exceptional sentence, did not engage in any judicial factfinding, and did not increase White's sentence. Similar to *Rowland*, the trial court "did not redecide the justification for the exceptional sentence"—it simply adjusted the offender score and standard range and "left the justification intact." *See Rowland*, 174 Wn.2d at 155.

White attempts to distinguish *Rowland* by noting that it "did not address RCW 9.94A.537(2)". Br. of Appellant at 8. But *Rowland* did not address RCW 9.94A.537(2) because that statute was inapplicable based on the facts of Rowland's case—just as it is inapplicable based on the facts of White's case. RCW 9.94A.537 was enacted in response to *Blakely* and *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007) to give trial courts the authority to impanel juries to find aggravating circumstances in all cases that come before the court. *State v. Elmore*, 154 Wn. App. 885, 904, 228 P.3d 760 (2010); Laws of 2005, ch. 68, § 1; Laws of 2007, ch. 205 § 1. Thus, RCW 9.94A.537(2) merely sets forth the *procedure* by which aggravating circumstances may be tried to a jury. *Elmore,* 154 Wn. App. at 904; *State v. Gordon*, 172 Wn.2d 671, 679 n. 4, 260 P.3d 884 (2011) ("RCW 9.94A.537 establishes procedural requirements"); *see Evans*, 154 Wn.2d at 448 ("*Blakely* is procedural as it concerns itself with *how* sentencing is to be conducted.") (emphasis in original). Because *Blakely* did not

apply at Rowland's resentencing, the procedures set forth in RCW 9.94A.537 in response to *Blakely* likewise did not apply.

The same analysis applies in White's case. Neither *Blakely* nor the procedures outlined in RCW 9.94A.537 were applicable at White's resentencing to correct the judgment and sentence based on *Blake*. The Supreme Court has determined that RCW 9.94A.537 "does not apply to any cases decided before its 2005 enactment." *In re Pers. Restraint of Beito*, 167 Wn.2d 497, 507, 220 P.3d 489 (2009) (citing *Pillatos*, 159 Wn.2d 459). White's case is such a case—it was decided and final prior to 2005. Thus, the trial court properly vacated White's UPCS conviction, corrected his offender score and standard range, and reimposed an exceptional sentence based on the deliberate cruelty aggravating factor previous found by the court and affirmed on appeal. *Blake* does not provide a basis to revisit this settled issue.

2. The trial court properly limited White's remedy to correcting the judgment based on *Blake*.

The trial court properly exercised its discretion to limit White's remedy to correcting the judgment and sentence based

on *Blake. Blake* does not provide a basis to revisit the deliberate cruelty aggravating factor in White's judgment and sentence, which had long been final.

Blake held that the strict liability drug possession statute is unconstitutional and violates due process. *Blake*, 197 Wn.2d at 195. Accordingly, the Court concluded that the statute is void and vacated Blake's UPCS conviction. *Id.* A conviction based on an unconstitutional statute must be vacated. *State v. Carnahan*, 130 Wn. App. 159, 164, 122 P.3d 187 (2005); *State v. LaBounty*, 17 Wn. App. 2d 576, 581, 487 P.3d 221 (2021); *see State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986) (a conviction based on an unconstitutional statute cannot be considered in calculating the offender score).

At the *Blake* hearing, the trial court properly vacated White's prior UPCS conviction and corrected his offender score and standard sentence range. But the order correcting the judgment and sentence based on *Blake* did not open the door to other time-barred claims. If the trial court simply corrects the

original judgment and sentence, it is the original judgment and sentence that controls. *State v. Kilgore*, 167 Wn.2d 28, 40-41, 216 P.3d 393 (2009). Here, the trial court did not exercise discretion to rule on claims unrelated to *Blake*. It simply corrected the judgment and sentence. *See* CP 100-03.

The time-bar exception for a facially invalid judgment does not act as a "super exception" that opens the door to all other claims. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 426, 309 P.3d 451 (2013); *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 141, 144, 267 P.3d 324 (2011) (a claim that the judgment is invalid on its face may not be used to make an end run around the time limit for collateral attacks). Opening the door "to claims that do not fall within one of the enumerated exceptions in RCW 10.73.090 or RCW 10.73.100 would require us to ignore the interests of finality in situations where the legislature intended finality to carry the day." *Adams*, 178 Wn.2d at 426 (quoting *Coats*, 173 Wn.2d at 170) (Stephens, J., concurring).

Here, the trial court properly exercised its discretion to permit White to seek relief only for the defect that rendered the judgment invalid—the inclusion of the prior UPCS conviction in his judgment that increased his offender score. *See Adams*, 178 Wn.2d at 424 (explaining that a petitioner may seek relief only for the defect that renders the judgment invalid on its face). The trial court properly vacated the UPCS conviction and adjusted his offender score based on *Blake*. White's remedy was properly limited to correcting that error. *See Adams*, 178 Wn.2d at 427.

3. RCW 9.94A.537 was inapplicable at White's resentencing and did not require the trial court to impanel a jury to consider aggravating factors before reimposing an exceptional sentence.

The purpose of White's resentencing was to vacate the prior UPCS conviction under *Blake* and correct his offender score and standard sentence range. White was not resentenced due to a *Blakely* error. Thus, RCW 9.94A.537 did not require the trial court to impanel a jury to consider an aggravating factor previously found by the trial court and affirmed on appeal.

White misconstrues the legislative intent of RCW 9.94A.537 and its applicability to his case. This statute is inapplicable because it was enacted in response to *Blakely* to set forth the *procedure* by which aggravating circumstances may be tried to a jury. It is in applicable in White's case because his judgment was final before *Blakely* and before the enactment of this statute.

In 2004, the United States Supreme Court held that defendants have a constitutional right to have a jury determine beyond a reasonable doubt any aggravating factor, other than the fact of a prior conviction, used to impose a greater punishment than the standard range. *Blakely*, 542 U.S. 296; Laws of 2005, ch. 68, § 1. In response to *Blakely*, the Washington Legislature amended the SRA by adding a statute, former RCW 9.94A.537 (2005), which allowed juries to decide the existence of aggravating factors—also known as the "*Blakely* fix." *Beito*, 167 Wn.2d at 507; Laws of 2005, ch. 68, § 1, 4. The 2005 amendments authorized a new procedure for juries to consider

aggravating factors supporting an exceptional sentence. *Elmore*, 154 Wn. App. at 904 (citing former RCW 9.94A.537(2) (2005)). But the Supreme Court has held that this amendment does not apply to any cases decided before its 2005 enactment. *Beito*, 167 Wn.2d at 507 (citing *Pillatos*, 159 Wn.2d 459).

In 2007, the Washington Supreme Court reiterated its holding that trial courts do not have inherent authority to impanel sentencing juries. *Pillatos*, 159 Wn.2d at 469-70. The Court also held that the Laws of 2005, chapter 68,[4] by its terms, apply to all pending criminal matters where trials have not begun or where pleas have not yet been accepted. *Pillatos*, 159 Wn.2d at 470, 474. Thus, the amendments did not apply where the defendant was found guilty prior to the effective date of the statute. "As a result of these decisions, the State had no procedure for applying the *Blakely* required procedures to defendants who had pleaded

[4] Section 4 of the Laws of 2005, chapter 68 was subsequently codified as RCW 9.94A.537. *Elmore*, 154 Wn. App. at 904.

guilty or been tried before the effective date of the 2005 '*Blakely*-fix' legislation." *Elmore*, 154 Wn. App. at 904.

In response to *Pillatos*, the Legislature amended former RCW 9.94A.537 (2005) to allow trial courts to impanel juries to find aggravating factors *in all cases* that come before the court, regardless of the date of the original trial or sentencing. *Elmore*, 154 Wn. App. at 904 (citing Laws of 2007, ch. 205, § 1); *see also* RCW 9.94A.537(2); *Beito*, 167 Wn.2d at 507. Washington courts acknowledge that the 2007 amendments to RCW 9.94A.537 affirmatively changed the statute to ensure that the *procedural* requirements in *Blakely* apply to *all* cases before the court, not just those where the defendant has not pleaded guilty or been tried. *Parmelee*, 172 Wn. App. at 913; *Elmore*, 154 Wn. App. at 906.

Thus, RCW 9.94A.537(2) merely sets forth the *procedure* by which aggravating circumstances may be tried to a jury. *Elmore,* 154 Wn. App. at 904; *Gordon*, 172 Wn.2d at 679 n. 4; *see Evans*, 154 Wn.2d at 448. Contrary to White's claim, RCW

9.94A.537(2) does not dictate that the trial court in White's case was "required" to impanel a jury to decide aggravating factors that were previously found by the trial court, affirmed on appeal, and final decades prior to the *Blake* decision.

White's judgment and sentence was final when this Court issued its mandate on December 18, 2001. *See* CP 137, 151-52, 155; RCW 10.73.090(3)(b); *Skylstad*, 160 Wn.2d at 948. Similar to *Rowland*, the Court of Appeals previously rejected White's challenge to the factual basis for the exceptional sentence and affirmed the basis for the exceptional sentence, which has not been disturbed. *See Rowland*, 174 Wn.2d at 155; *see also* CP 128-30, 135-37, 145-48, 151-52; *White I*, 1998 WL 109981, at *2-3; *White II*, 145 Wn.2d 1013; *White III*, 164 Wn.2d 1029. The recent *Blake* opinion requiring courts to vacate UPCS convictions does not alter these prior appellate holdings.

Relying on *State v. Douglas*, 173 Wn. App. 849, 855-56, 295 P.3d 812 (2013), White argues that RCW 9.94A.537(2) applies to his resentencing and requires the court to impanel a

jury to consider any aggravating factors. *See* Br. of Appellant at 6. White's reliance on *Douglas* is misplaced. In *Douglas*, this Court held that RCW 9.94A.537(2) does not bar the State from seeking an exceptional sentence after a new trial on remand even if an exceptional sentence was requested but not imposed following the previous trial. *Douglas*, 173 Wn. App. at 856. White's case does not involve a new trial on remand. More importantly, this Court explicitly agreed with the State's argument that "RCW 9.94A.537(2) applies only to resentencing hearings required because of a *Blakely* error but not sentencing following a new trial." *Douglas*, 173 Wn. App. at 855 (footnote omitted).

Here, White was not resentenced due to a *Blakely* error. Rather, he was resentenced under *Blake* after the court vacated his prior UPCS conviction. CP 100-03. The trial court corrected his offender score and standard sentence range and entered an order correcting his judgment and sentence. *Id.* Because White

was not resentenced due to a *Blakely* error, RCW 9.94A.537(2) does not apply. *See Douglas*, 173 Wn. App. at 855.

White cites no authority for his claim that the trial court was "required" to impanel a jury to redecide an aggravating factor previously found by the trial court and affirmed on appeal. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Here, the trial court correctly concluded that it had the authority to impose an exceptional sentence based on the previous findings made by the trial court regarding the deliberate cruelty aggravating factor, which had been "upheld multiple times by the Court of Appeals[.]" *See* 2021-RP 11, 24, 29. The findings regarding the aggravating factor and imposition of the exceptional sentence were affirmed on appeal, and White's judgment became final prior to *Blakely* and prior to the

enactment of RCW 9.94A.537 and decades prior to the *Blake* hearing. The trial court did not disturb those factual findings and did not engage in any judicial factfinding at the hearing. Rather, the court adopted the prior findings and adjusted the sentence "to approximately the same place in the range" as the prior sentence after removing the UPCS conviction and adjusting the offender score. 2021-RP 29-30. The court then reimposed the exceptional sentence based on the prior findings. CP 102-03; 2021-RP 29-30. Thus, the trial court did not exceed its authority by reimposing the exceptional sentence based on findings that were affirmed on appeal in a judgment that had been final for decades.

B. The Law of the Case Doctrine Bars Reconsideration of the *Blakely* Issue That This Court Previously Considered and Rejected on the Merits.

The law of the case doctrine bars reconsideration of the *Blakely* issue that this Court has repeatedly rejected on the merits. This Court previously concluded that *Blakely* does not apply to White's judgment and sentence because it was final

before *Blakely* was issued. This issue was previously litigated and decided, and there is no reason to revisit these decisions.

Under the law of the case doctrine, "once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The doctrine precludes redeciding the same legal issues in a subsequent appeal if there is no substantial change in the evidence. *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988). The doctrine promotes finality and efficiency in the judicial process. *Roberson*, 156 Wn.2d at 41.

Courts apply the doctrine "to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts." *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). Decisions by an appellate court are binding on further proceedings in the trial court on remand,

and appellate courts will generally not redetermine rules of law announced in a prior decision in the same case. *Id.*

The doctrine is discretionary in that an appellate court may choose to revisit an issue if the earlier decision was clearly erroneous and would result in a manifest injustice. *Greene v. Rothschild*, 68 Wn.2d 1, 8-10, 414 P.2d 1013 (1966); *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). The doctrine has been codified in RAP 2.5(c), which provides in relevant part:

> *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

Worl, 129 Wn.2d at 424; RAP 2.5(c)(2). Despite the permissive language in RAP 2.5(c)(2), appellate courts have adhered to the standards set forth in *Greene*, which require that an appellate court may reconsider only those decisions that were clearly erroneous and would result in a manifest injustice to one party. *Worl*, 129 Wn.2d at 425. An exception to the doctrine also exists

where there has been a subsequent change in controlling precedent on appeal. *Roberson*, 156 Wn.2d at 42-43.

An appellate court's decision becomes the law of the case and is binding on the trial court once the mandate is issued. *State v. Strauss,* 119 Wn.2d 401, 412, 832 P.2d 78 (1992). In *Worl*, the Court held that the law of the case doctrine precluded the Court of Appeals from reconsidering the identical exceptional sentence issue in the second appeal that it had decided in the first appeal because the court's earlier decision was not clearly erroneous or manifestly unjust. *Worl*, 129 Wn.2d at 424-26. The Court concluded that "[c]ourts should apply the law of the case doctrine in cases like this" where the sentencing issues "were litigated and decided" in the first appeal. *Id.* at 428-29. The Court of Appeals should not have revisited the issue in the second appeal without first concluding that its earlier decision was clearly erroneous and worked a manifest injustice. *Id.* at 429.

Here, White has repeatedly litigated the *Blakely* issue in the appellate courts. And this Court repeatedly rejected his

claims on the merits. The law of the case doctrine bars reconsideration of this issue.

White appealed his 1999 resentencing, and this Court held that the trial court did not err by imposing the same exceptional sentence because the deliberate cruelty factor, standing alone, was sufficient to support the sentence. CP 128-30. The Supreme Court denied review. *White II*, 145 Wn.2d 1013. The judgment and sentence became final on December 18, 2001—the date the Court issued the mandate. *See* CP 151-52; RCW 10.73.090(3)(b).

In 2004, after his appeal was final, White sought relief arguing that *Blakely* prohibited the trial court from imposing an exceptional sentence unless the jury determined the deliberate cruelty aggravating factor. CP 131-35. This Court concluded that *Blakely* does not apply retroactively to White's judgment, which became final in 2001 before *Blakely* was issued, and dismissed the petition. CP 136-37. The Supreme Court denied review. In 2007, this Court yet again rejected White's claim that *Blakely*

applied to his exceptional sentence, noting that his judgment and sentence was final before *Blakely* was decided. CP 143-48. The Supreme Court denied review. *White III*, 164 Wn.2d 1029.

Thus, the *Blakely* issue has already been "litigated and decided" on the merits. *See Worl*, 129 Wn.2d at 428-29. The law of the case doctrine precludes reconsideration of this issue because the decision is not "clearly erroneous" or "manifestly unjust." *Id.* at 425-26. The appellate court decision was binding on the trial court after the mandate was issued. *Strauss,* 119 Wn.2d at 412. The trial court properly declined to revisit the *Blakely* issue.

V. CONCLUSION

For the foregoing reasons, the trial court did not exceed its authority by reimposing an exceptional sentence. This Court should affirm the sentence.

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RESPECTFULLY SUBMITTED this 17th day of June, 2022.

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6/17/2022	*s/ Kimberly Hale*
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PIERCE COUNTY PROSECUTING ATTORNEY

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